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Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,)

) CR-20051393

Plaintiff,)

) **MOTION TO PRECLUDE**

vs.)

)

)

TROY TAYLOR,) (Hon. Steven Villareal)

)

Defendant.)

_____)

Pursuant to the Due Process Clause to the United States Constitution, to Rules 701 and 702, Arizona Rules of Evidence, and to Rules 15.1 and 15.7, Arizona Rules of Criminal Procedure, Troy Taylor moves this Court to preclude the testimony at trial of Wendy Dutton. This motion is supported by the accompanying memorandum of points and authorities.

RESPECTFULLY submitted this ____ day of March, 2006.

Law Office of COOPER & UDALL

By _____

Dan H. Cooper

Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Wendy Dutton has been disclosed by the State as an expert witness. Dutton should be precluded for the following reasons:

1) Ms. Dutton has previously embellished and exaggerated her academic credentials in order to be qualified as an expert. In fact, her prior exaggerations, if not perjurious, kept the truth about her background from the fact-finder.

2) Ms. Dutton knows nothing about this case, has read no reports, has not written a report herself, and is unable to state what will be the specific subject of her testimony other than the broad genre of “child sexual abuse.” The State relies on *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (1996), to support calling Dutton as a “cold” expert witness. That case is wholly inapposite to the instant case. Dutton’s testimony in *Curry* was allowed because she was testifying largely regarding the Child Sexual Abuse Accommodation Syndrome. The “Syndrome” was first written about by psychiatrist Roland Summit in 1983. By 1992 Summit had specifically claimed that this “Syndrome” is not a diagnostic tool and should not in any way be used to determine whether or not abuse had taken place. Summit specifically said his syndrome was not a syndrome. (See attached Exhibit A, telephonic interview of Wendy Dutton, *State v. Dominiquez*, p. 14-15). Thus, the foundation for admission of her testimony in *Curry* has changed.

3) The provisions of Rule 15.1, Arizona Rules of Criminal Procedure, do not provide for testimony of experts who have not minimally disclosed their opinions, the issue upon which they will testify, and have not provided a report as to that issue or issues. Rule 15.7 provides the sanction of preclusion.

4) Dutton's "specialty" is conducting forensic interviews. She has worked exclusively in that field since 1992. Prior to that she worked for five years with juvenile offenders by using aversive therapy including the plethysmograph, a device used by attaching wires to the genitals of the children. The program was shut down when the techniques being used on the children came under intense scrutiny. Thus, Dutton's professional and academic background in no way qualify her as an "expert."

5) Rule 26.1, Arizona Rules of Civil Procedure, provides, in pertinent part:

Prompt disclosure of information.

(a) Duty to disclose, scope. Within the time set forth in subdivision (b), each party shall disclose in writing to every other party:

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

A party who chooses to present expert testimony in civil cases is required to disclose explicit and detailed testimony of that expert. In a criminal case involving the liberty of a party it is

inconceivable that the standards for disclosure of expert testimony would be less than the standard in a case involving simply money.

II. DUTTON HAS EMBELLISHED, MISLEAD, AND BEEN DECEPTIVE ABOUT HER ACADEMIC AND PROFESSIONAL CREDENTIALS

The testimony of an expert witness often carries great weight in litigation. The background, both academic and professional, of the expert is of paramount importance. The more academic credentials, or relevant work experience, possessed by an expert the more credible that expert is to a jury. The State's proposed expert in this case, Wendy Dutton, is a fraud. She has repeatedly misled attorneys and juries about her professional experience and her academic credentials.

Dutton is a master's level counselor. She received her master's degree in counseling from the University of Arizona in 1985. She moved to Phoenix and enrolled in a Ph.D. program at Arizona State University. She says she is studying for a Ph.D. in justice studies. Dutton is unclear as to the year she enrolled. Under oath she testified she was accepted into the program in 1993. (See attached Exhibit B, transcript of Dutton testimony in *State v. Arciaga*, p. 32) She has also testified in October 2004 that she has been in the Ph.D.

program for “probably ten years.” (See attached Exhibit C, transcript of Dutton interview in *State v. Rodriguez*, 10/29/04, p. 3-4) And, more recently, she claims to have entered the Ph.D. program in 1992. (See attached Exhibit D, p. 8, transcript of interview, 3/23/06)

Of greater importance than Dutton’s imprecise memory as to her entry into the Ph.D. program is her outright deception as to her progress toward her degree. In 1998, Dutton stated in a witness interview she “prayed” she would have her Ph.D. “within the next year.” (See attached Exhibit E, transcript of interview of Dutton, *State v. Perez*, 12/17/98, p. 2) Nearly six years later she used virtually the same words when she claimed she hoped to complete the Ph.D. “within the next year.” (See attached Exhibit C, p.3) In fact, Dutton is even today nowhere near completion of her Ph.D. Such programs have strict requirements for academic progress. (See attached Exhibit F, ASU catalog regarding Doctor of Philosophy) Comprehensive examinations are a requirement in the Ph.D. program to be taken upon completion of coursework. Dutton claims she finished her coursework although she is vague as to the year it was completed. (See attached Exhibit B, transcript of Dutton testimony, *State v. Arciaga*, 8/5/04, p. 32) Nonetheless she has not even taken her comprehensive exams. (See Exhibit D, p.10) Moreover, she has not received approval for the subject and title of her dissertation which must come from her dissertation committee. (See exhibit D, p. 10) In fact, she does not now even have a committee. She has not had a committee since 1998. (See Exhibit D, p. 11) Thus, her claim in 2004 that she hoped to finish her Ph.D. within a year was made despite not having

a committee, not having taken or passing her comprehensive exams, not having approval for a subject and title for her dissertation, and not having written and defended the dissertation. The statement, in other words, was a lie. Two years later she still does not have a committee. (See Exhibit D, p. 11 -12)

Dutton's prevarications about her progress towards her degree are magnified by explicit questions about her dissertation. A Ph.D. candidate must have approval from his or her committee for the research topic, subject and title of the dissertation before beginning. (See Exhibit F) Dutton has no committee. She is therefore unable to begin to write her dissertation. She has admitted this lack of approval. (See Exhibit D, p. 11-12) That has not stopped her in the past from claiming the opposite. Dutton testified under oath as follows: "I'm working on my dissertation now." (See attached Exhibit B, p. 32) She stated in a witness interview that same year that "I am working on my dissertation right now. But it is not completed yet." (See attached Exhibit C, p. 3) Dutton's claim that her dissertation is not "complete" and she is "working on it" is obfuscation of the highest order. The implication she portrays is absolutely false: she has not even received approval for a topic. She never even hinted in her testimony or statement that "working" on her dissertation meant gathering information so she could receive approval for a topic. Dutton's answers regarding her dissertation show her to possess either a remarkable lack of candor or to be a liar.

But Dutton does not limit her puffery or misdirection regarding her education to her

Ph.D. program. She received her bachelors of science degree in 1983. Her major was psychology. But Dutton's desire to inflate her academic credentials meant testifying that her B.S. degree was "largely neuropsychology." (See Exhibit G, interview of Dutton, *State v. Long*, 6/3/05, p. 9) Neuropsychology, of course, is a more scientifically-oriented sub-specialty of psychology. To claim specialization in neuropsychology obviously is an attempt to bolster

her scientific credentials. In fact, Dutton's degree was not "largely neuropsychology." She took two courses in neuropsychology while she was an undergraduate, all that was offered. (See Exhibit D, p. 25) She has yet again exaggerated and distorted her academic record.

Dutton's distortion of her academic record is compounded by her inability to tell the truth about her professional career. She has, since 1992, worked for St. Joseph's Hospital where her job has been to conduct forensic interviews. Since 1992 she has also acted as an expert witness on child sex abuse issues despite her lack of a Ph.D. and despite the narrow range of her job. When specifically asked on March 23, 2006 whether she had treated any children since 1992 she replied that she had not. (See Exhibit D, p. 40) Under oath, however, in a trial where a defendant's liberty was at stake, Dutton sought to bolster her own credibility as a child expert. She stated:

Since I started at St. Joseph's Hospital in 1992 I've interviewed over 4000 children who have ever witnessed or alleged abuse, and I've treated approximately 200 victims of abuse and approximately 400 sex offenders.

(emphasis added) (See Exhibit H, transcript of testimony of Wendy Dutton, *State v. Miller*, 5/14/03, p. 13) Thus, under oath, in order to make herself appear more qualified, Dutton claimed an expanded role that did not exist in her work with children.

Dutton also is unable to be consistent in her expert opinions. For instance, when asked how many abused children show symptoms she stated under oath in 2003 that half show no symptoms. (See Exhibit I, *State v. Leon*, 9/24/03, p. 411) This statement is a far cry from her

testimony under oath in *State v. Excobar-Mendez* on October 6, 1997: “As I said, most victims of sexual abuse would show no symptoms.” (See Exhibit J, testimony of Wendy Dutton, p. 44) Then, in an interview on May 17, 2004, Dutton told the attorney questioning her what she had said in *Leon*: “half of children are asymptomatic.” (See Exhibit K, interview of Wendy Dutton, *State v. Dempsey*, p. 5) In other words, Dutton tailors her response to the case. Sometimes the number of asymptomatic children is half, and sometimes it is “most.”

In summary, Dutton has been either directly dishonest or deliberately not forthcoming in multiple areas including her prior academic experience, her current academic progress and her professional experience. She is a witness who cannot and should not be trusted. A witness who would repeatedly embellish is biased, a zealous advocate, and not a dispassionate, objective observer. The term “expert witness” does not anticipate such a lack of objectivity nor does it anticipate the bias inherent in a witness who would make a

career of distorting her record in order to impress the trier of fact. She should not be allowed to testify.

III. THE STATE'S DISCLOSURE VIOLATES DEFENDANT TROY TAYLOR'S SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION

The State's failure to disclose the subject of Dutton's expert testimony, and Dutton's inability to say what the testimony will include because she knows nothing about the case, violates Troy Taylor's Sixth Amendment right to confrontation and his right to cross-examination. Labeling Dutton as a "blind" and "cold" expert regarding child sexual abuse means she will not be able to be interviewed with any specificity prior to trial about how her

testimony relates to the instant case. Any cross-examination about specific facts must be done during trial as Dutton is unwilling to read any documents, or facts, about the case before she testifies. The range of issues in child sexual abuse cases is great. The refusal by the State and Dutton to disclose which of the many issues will be the subject of her purported expertise makes for, at best, blind cross-examination. The lack of specificity is not only unfair it makes it impossible to prepare. Dutton has previously claimed expertise in an wide range of topics related to child sexual abuse. For the State not to be specific as to what topic will be the subject of her testimony strikes directly at the heart of cross-examination. This is trial by ambush.

The Sixth Amendment to the Constitution guarantees every criminal defendant the

opportunity for effective cross-examination. *Douglas v. Alabama*, 380 U.S. 415 (1965). It is imperative that a defendant be able to fully and fairly probe and explore a witness' infirmities through cross-examination. *United States v. Owens*, 484 U.S. 554 (1988). Indeed, the Confrontation Clause of the Sixth Amendment guarantees the right of an accused to confront and cross-examine witnesses. *Pointer v. Texas*, 380 U.S. 400 (1965). The main purpose of confrontation is to secure the opportunity of cross-examination. *Davis v. Alaska*, 415 U.S. 308 (1974). The State, by its refusal to even have its witness learn anything about the instant case, and by its refusal to disclose the subject of her testimony (other than the generic subject of "child sexual abuse") has made effective cross-examination an impossibility. This attack on the Sixth Amendment must be precluded.

IV. THE CONCEPT OF A COLD EXPERT CANNOT MEAN A SURPRISE EXPERT

The purpose of disclosure, in civil cases, is to give each party adequate notice of what arguments will be made and what evidence will be presented at trial. *Clark Equipment Company v. Arizona Property and Cas. Ins. Guar. Fund*, 189 Ariz. 433, 943 P.2d 793 (Ct. App. 1997) The rationale behind Rule 26.1, Arizona Rules of Civil Procedure, is to prevent surprise. That rationale clearly applies to criminal cases. Experts in civil cases must be specific and the basis of their opinions must be disclosed. Trials are not intended to be guessing games.

Dutton has previously been qualified as a "cold" expert in a reported case, *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (1996), in which she testified about the Child Sexual

Abuse Accommodation Syndrome (CSAAS), a set of behavioral “characteristics common to child sexual abuse victims.” This “syndrome” has, since 1996, been the subject of much controversy, dispute, and litigation. The psychiatrist who initially wrote about Child Sexual Abuse Accommodation Syndrome has since repudiated many of the ways in which the “syndrome” has been used. Dutton herself has admitted that the “syndrome” is not in fact a syndrome. (See Exhibit A, p. 15-16) Thus, caselaw for use of “cold” experts in criminal cases is suspect at best. Indeed, one of the main criteria for admission of expert testimony is that the unfair prejudicial effect does not outweigh the probative value. *State v. Nordstrom*, 25 P.3d 717, 200 Ariz. 229 (2001). Nothing could be more prejudicial than preparing to cross-examine

an expert without knowing the specific opinions that expert is going to offer and without knowing the narrow subject of that expert.

V. SANCTIONS UNDER RULE 15.7 PERMIT PRECLUSION OF THE WITNESS

Rule 15.7, Arizona Rules of Criminal Procedure, provides sanctions for failure to make proper disclosure. Trial courts have options available such as dismissal of the case, contempt for a witness, imposing costs, or preclusion. Rule 15.7 (a). The choice of sanctions is within the trial court’s discretion and typically will not be disturbed absent a

showing of prejudice. *State v. Tyler*, 149 Ariz. 312, 718 P.2d 214 (Ct.App 1986); *State v. Eisenbord*, 137 Ariz. 385, 670 P.2d 1209 (Ct. App. 1983). Inability to produce data upon which an expert relies for his opinion may result in exclusion of that expert testimony. *US v. Scholl*, 959 F.Supp. 1189, affirmed, 166 F.3d 964, amended on denial or rehearing, certiorari denied, 120 S.Ct 176, 528 U.S. 873, 145 L.Ed.2d 149 (1997).

Certainly preclusion of a witness is a dramatic and harsh sanction for a trial court to take. However, there is precedent for the sanction of preclusion. Moreover, it is difficult to imagine a case where the remedy of preclusion is more appropriate. The trial court in *State v. Meza*, 203 Ariz. 38, 50 P.3d 407 (2002), was upheld after it suppressed breath test results as a sanction against the state because of discovery violations committed by city crime lab personnel who lied about deleting calibration results. The law is clear that the sanction of

preclusion is a last resort which should be used only when less stringent “sanctions are not applicable to effect the ends of justice.” *State v. Tucker*, 157 Ariz. 433, 759 P.2d 579 (1988).

In the instant case, Troy Taylor is faced with discovery violations that may not be remedied by a sanction other than preclusion. The primary violation is that the State has presented an expert witness who, at best, has embellished and exaggerated her academic and professional resume and, at worst, has lied. This expert has also refused to read any disclosure about the case. She knows nothing about the case. (Whether or not she has

been directed to take this tact is certainly an important question although the concept of a “blind” expert is clearly dubious.) Thus, preparation for cross-examination of this expert is simply impossible. The facts of this case will, of necessity, be applied to whatever the expert says about child sexual abuse. Cross-examining her about those facts will be done without knowledge of how she will respond since prior to trial she refused to state in what area of child sexual abuse she will testify. She may state nothing about the facts since she doesn’t know them. Educating an expert while in trial about how the facts relate to her opinions is not only daunting, it is unfair and a violation of due process.

In determining whether the sanction of preclusion is appropriate the court must obviously look to less stringent remedies. *State v. Delgado*, 174 Ariz. 252, 848 P.2d 337 (1993). There is, however, no less stringent remedy in this case. The witness proposed by the State has a history of providing misleading, inaccurate and deceptive information to courts and juries as well as to attorneys. Nothing can change her past answers or deceptions. This is a

witness who, by her past, has precluded herself from now testifying. There is no other sanction available for a witness such as Ms. Dutton. She should not be allowed to testify.

RESPECTFULLY submitted this ____ day of March, 2006.

Law Office of COOPER & UDALL

By _____
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Copies of the foregoing
mailed this date to:

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